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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ALFRED E. RAMEY, PETITIONER

v.

UNITED STATES GENERAL ACCOUNTING OFFICE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a party prevailing in an administrative decision on a claim that rights secured by Title VII of the Civil Rights Act of 1964 were violated is entitled, under the General Accounting Office Personnel Act of 1979, 31 U.S.C. §§ 731-755, to a court award of attorneys' fees under the standards of Title VII, 42 U.S.C. § 2000e-5(k), for defending against the government's appeal of the final administrative decision.

2. Whether the General Accounting Office Personnel Act, 31 U.S.C. §§ 731-755 incorporates the

attorneys' fees provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).

TABLE OF CONTENTS

	Page
Opinions Below.....	2
Jurisdiction.....	3
Constitutional and Statutory Provisions Involved.....	4
Statement.....	12
Reasons for Granting the Petition.....	19
Conclusion.....	48
Appendix A.....	1a
Appendix B.....	1b
Appendix C.....	1c
Appendix D.....	1d

TABLE OF AUTHORITIES

Cases:

Ayon v. Sampson, 547 F.2d 446 (9th Cir. 1976).....	20

Chandler v. Rondebush, 425 U.S. 840 (1976)..... 28

Hale v. Marsh, 808 F.2d 616 (7th Cir. 1986)..... 20

Hoska v. United States Department of the Army, 694 F.2d 270 (D.C. Cir. 1982)..... 33, 34

Maher v. Gagne, 448 U.S. 122 (1980)..... 29

Morton v. Mancari, 417 U.S. 535 (1974)..... 28

Olsen v. Department of Commerce, 735 F.2d 558 (Fed. Cir. 1984)..... 31, 32, 33

Udall v. Tallman, 380 U.S. 1 (1962)..... 20

Williams v. Office of Personnel Management, 718 F.2d 1553 (Fed. Cir. 1983)..... 26

Wood v. Regan, 622 F.Supp. 399 (E.D. Pa. 1985)..... 27, 28, 30

Statutes and Regulations:

Civil Rights Act of 1964:
42 U.S.C. § 2000e-5(k).....passim
42 U.S.C. § 2000e-16.....9,10, 20,42
42 U.S.C. § 2000e-16(b).....20

Age Discrimination in Employment Act
29 U.S.C. §§ 631, 633a..... 9

Fair Labor Standards Act
29 U.S.C. § 206(d).....10

Rehabilitation Act of 1973
29 U.S.C. § 791.....10

Civil Service Reform Act of 1978
5 U.S.C. § 2302(b)(1).....8,9, 21,25, 38
5 U.S.C. § 7701.....passim
5 U.S.C. § 7701(g).....passim
5 U.S.C. § 7701(g)(1).....passim
5 U.S.C. § 7701(g)(2).....passim
5 U.S.C. §§ 7701-7702.....passim
5 U.S.C. §§ 7701-7703.....31

General Accounting Office Personal Act of 1979

31 U.S.C. § 52-2(g)(3) (1980).....42,43, 44

Pub. L. 96-191, 94 Stat.

27 (1979).....43
Pub. L. 97-258, 96 Stat. 877 (1982).....42
31 U.S.C. §§ 731-755.....passim
31 U.S.C. § 732.....4,
31 U.S.C. § 732(f).....4,41, 46,47
31 U.S.C. § 732(f)(1).....4
31 U.S.C. § 732(f)(2).....5,37, 39,40, 42,44, 46,48
31 U.S.C. § 752(b)(3).....13
31 U.S.C. § 753.....passim
31 U.S.C. § 753(d).....passim
31 U.S.C. §§ 751-754.....48

Federal Courts Improvement Act of 1982
28 U.S.C. § 1295(a)(9).....31

Equal Access to Justice Act
28 U.S.C. § 2412.....33

Back Pay Act
5 U.S.C. § 5596(b).....33

Equal Employment Opportunity Commission Regulations
29 C.F.R. § 1613.261.....20

Reorganization Plan No. 1 of 1978
43 Fed. Reg. 1980 (1978), 92 Stat. 3781.....20

Miscellaneous:

H. Rep. No. 97-651, Report of the Judiciary Committee of the House of Representatives on H.R. 6128, 97th Cong., 2d Sess. (1982) reprinted in 1987 U.S. Code Cong. & Ad. News 1895.....42,44,

Hearings on H.R. 3339 Before the Subcomm. on the Civil Service, House of Representatives Comm. on the Post Office and Civil Service, 96th Cong. 1st Sess. (1979).....46

APPEARANCE FORM
SUPREME COURT OF THE UNITED STATES

No. _____

ALFRED E. RAMEY vs. UNITED STATES GENERAL ACCOUNTING OFFICE,
Petitioner, Respondent.

The Clerk will enter my appearance as Counsel of Record for ALFRED E. RAMEY who IN THIS COURT is the Petitioner. I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature: _____

Name: Robert B. Fitzpatrick

[x] Mr. [] Ms. [] Mrs. [] Miss

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VIII

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. _____

ALFRED E. RAMEY, PETITIONER

v.

UNITED STATES GENERAL ACCOUNTING OFFICE, RESPONDENT*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. Alfred E. Ramey, the Intervenor below, on his own behalf petitions for a writ of certiorari to review the judgment of the United

* Mr. Ramey is the Intervenor below. The United States General Accounting Office Personnel Appeals Board was the Appellee below and the United States General Accounting Office was the appellant below.

States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The principal opinion of the Court of Appeals for the District of Columbia Circuit No. 86-1443, (Appendix A hereto, p.1a) is unreported. The Orders of the Court of Appeals for the District of Columbia Circuit, denying rehearing and rehearing en banc (Appendices B and C hereto pp. 1b, 1c) are unreported. The decision of the full General Accounting Office

Personnel Appeals Board underlying this case (Appendix D hereto, p. 1d) is unreported.

JURISDICTION

The Order of the Court of Appeals (Appendix A) was entered on June 29, 1987. A timely petition for rehearing was denied on September 10, 1987. (Appendix B) A timely suggestion for rehearing en banc was denied on September 29, 1987. (Appendix C) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 732 of the General Accounting Office Personnel Act of 1979, Pub. L. 97-258, 96 Stat. 897, codified at 31 U.S.C. § 732, provides in pertinent part:

(f)(1)The personnel management system shall

(A) provide that all personnel actions affecting an officer, employee or applicant for employment be taken without regard to race, color, religion, age, sex, national origin, political affiliation, marital status or handicapping condition; and

* * *

(2) This subchapter and subchapter IV of this chapter do not affect a right or remedy of an officer, employee, or applicant for employment under a law prohibiting discrimination in employment in the Government on the basis of race, color, religion, age, sex, national origin, political affiliation, marital status, or handicapping condition. ...

2. Section 753 of the General Accounting Office Personnel Act of 1979, Pub. L. 97-258, 96 Stat. 901, codified in subchapter IV of the Act at, 31 U.S.C. § 753 provides in pertinent part:

(a) The General Accounting Office Personnel Appeals Board. ...

* * *

(b) The Board shall prescribe regulations -

(1) providing for officer and employee appeals consistent with sections 7701 and 7702 of Title 5.

...

3. Section 7701 of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1138, codified at 5 U.S.C. § 7701 provides in pertinent part:

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board

designated to hear a case, may require payment by the agency involved of reasonable attorneys fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee, as the case may be, determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this Title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

4. Section 2302 of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1114, codified at 5 U.S.C. § 2302 provides in pertinent part:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -

(1) discriminate for or against any employee or applicant for employment -

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule or regulation. ...

5. Section 717 of the Civil Rights Act of 1964, Pub. L. 92-261, 88 Stat. 111, codified at 42 U.S.C. § 2000e-16 provides in pertinent part:

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) ... shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * *

(b) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

6. Section 706 of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 259, codified at 42 U.S.C. § 2000e-5 provides in pertinent part:

(k) In any action or proceeding under this title the court may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

Petitioner was removed from his employment with the General Accounting Office (GAO). Petitioner believed that the GAO's action was improper because, inter alia, it was motivated by retaliatory animus for

petitioner's previous pursuit of equal employment opportunity complaints. He enlisted the assistance of private counsel to challenge the removal. With counsel's assistance, petitioner enlisted the further assistance of the General Counsel to the General Accounting Office Personnel Appeals Board.1/

1. After a full evidentiary hearing in which the General Counsel and petitioner's private counsel participated, a presiding official designated by the Personnel Appeals Board to hear the matter sustained

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1/ The General Counsel is empowered to investigate and prosecute wrongful personnel actions. 31 U.S.C. § 752(b)(3).

petitioner's removal. Petitioner's private counsel, together with the General Counsel petitioned the full Personnel Appeals Board to review the decision of the presiding official. The full Board accepted the petition and reversed the decision of the presiding official. App. D. The Board held that petitioner's removal was motivated by retaliatory animus due to petitioner's filing equal employment opportunity complaints. App. D. The Board ordered petitioner's reinstatement with backpay.

The General Accounting Office filed an appeal in the Court of Appeals for the District of Columbia

Circuit against the Personnel Appeals Board seeking reversal of the Board's decision. Petitioner, through private counsel, moved to intervene to defend his victory at the Board.2/

Thereafter, General Accounting Office moved for voluntary dismissal of the appeal without an award of costs or attorneys' fees. Petitioner opposed dismissal until the Court of Appeals awarded him attorneys' fees and costs for services rendered in intervening and

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2/ Petitioner also filed a request for an award of attorneys' fees with the Board, seeking payment of fees to private counsel for services rendered before the Board. A final decision has not yet been issued on that request.

defending against the General Accounting Office's appeal to the Court of Appeals.

2. On June 29, 1987, a panel of the Court of Appeals ordered that the appeal be dismissed, granting the motion for petitioner's intervention and denying petitioner's request for an award of attorneys' fees and costs for the services rendered before the Court of Appeals. App. A. The Court of Appeals determined that the General Accounting Office Personnel Act, of 1979, 31 U.S.C. §§ 731-55 does not incorporate the attorneys' fees provision Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k)

en bloc. Id. The panel decided that Section 753 of General Accounting Office Personnel Act, 31 U.S.C. § 753(d) incorporates Section 7701 of the Civil Service Reform Act, 5 U.S.C. § 7701(g) as the appropriate attorneys' fees provision. Id. The court recognized that section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e 5(k) is incorporated into the Civil Service Reform Act of 1978 by 5 U.S.C. § 7701(g)(2) and requires that the standards of the Civil Rights Act of 1964, govern attorneys' fees awards in cases of employment discrimination. Id. Nonetheless, the court held that

despite this incorporation of the Civil Rights Act, the Civil Service Reform Act does not permit court awards of attorneys' fees and costs under the standards of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k), for services rendered in court. Id. The Court ruled that under the General Accounting Office Personnel Act, 31 U.S.C. § 753(d) the Court may not award attorneys' fees for services rendered in a judicial forum. Id.

3. Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc. On September 10, 1987 the petition for rehearing was denied in an Order

from the panel that reaffirmed its previous holdings. App. B. On September 29, 1987 the suggestion for rehearing en banc was denied. App. C.

REASONS FOR GRANTING THE PETITION

Upon careful review of the merits of petitioner's removal from his employment, the General Accounting Office Personnel Appeals found "that the adverse actions taken by the Agency against Petitioner were in reprisal for his protected EEO [equal employment opportunity] activities." App. D. This constitutes a violation of

Title VII of the Civil Rights Act of 1964, as amended. See Hale v. Marsh, 808 F.2d 616 (7th Cir. 1986); Ayon v. Sampson, 547 F.2d 446 (9th Cir. 1976); 29 C.F.R. § 1613.261.3/

The General Accounting Office Personnel Act of 1979, 31 U.S.C. § 753(d), incorporates section 7701 of the Civil Service Reform Act of

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3/ This Equal Employment Opportunity Commission regulation provides that Section 717 of Title VII, 42 U.S.C. § 2000e-16, prohibiting reprisal for pursuing any complaints of discrimination in the federal government. The EEOC is charged with interpreting and enforcing civil rights statutes as applied to federal government employment. 42 U.S.C. § 2000e-16(b) Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 1980 (1978), 92 Stat. 3781. This interpretation of Title VII of the Civil Rights Act of 1964 is entitled to "great deference." See Udall v. Tallman, 380 U.S. 1 (1962).

1978, 5 U.S.C. § 7701. Section 7701(g)(2) of title 5 of the U.S. Code incorporates the standards of section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), for awards of attorneys' fees in cases involving violations of rights secured by the civil rights statutes enumerated in 5 U.S.C. § 2302(b)(1). 5 U.S.C. § 7701(g)(2). Section 706(k) of the 1964 Civil Right's Act, authorizes court awards of attorneys' fees. 42 U.S.C. § 2000e-5(k).

This case presents important questions governing the interpretation of statutes concerning the availability of and

standards for awards of reasonable attorneys' fees and costs to all employees of the General Accounting Office and all other federal employees covered by the Civil Service Reform Act who prevail at the administrative level in cases of employment discrimination and defend their administrative victories against appeals by the government.

The important issue in this case is whether or not the attorneys' fee provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), is incorporated into the General Accounting Office Personnel Act of 1979, 31 U.S.C. §§ 731-55, and the

Civil Service Reform Act of 1978, 5 U.S.C. § 7701(g)(2), thereby entitling prevailing employees to court awarded attorneys' fees when they defend against the government's appeal. This issue affects the availability of a remedy for discrimination against any of the employees of the United States General Accounting Office (GAO).

Moreover, the Court of Appeals' interpretation of the effect of the incorporation of 5 U.S.C. § 7701(g)(2) by 31 U.S.C. § 753(d) casts doubt upon the availability of awards of attorneys' fees under Title VII of the Civil Rights Act of 1964, as amended, whenever a federal

employee is required to defend in court a decision of the U.S. Merit Systems Protection Board on an issue concerning a violation of rights secured by Title VII of the Civil Rights Act of 1964, as amended. The court's interpretation of the General Accounting Office Personnel Act, 31 U.S.C. §§ 731-755 and the attorneys' fees provision of the Civil Service Reform Act, 5 U.S.C. § 7701(g), is, petitioner contends, plainly incorrect.

1. The Court of Appeals recognized that the General Accounting Office Personnel Act, 31 U.S.C. § 753(d) incorporates the attorney fees provision of the Civil

Service Reform Act, 5 U.S.C. § 7701. It also recognized that the Civil Service Reform Act prescribes that attorneys' fees are to be awarded under the standards of 42 U.S.C. § 2000e-5(k) when a violation of the Civil Rights Acts listed in 5 U.S.C. § 2302(b)(1) has occurred. 5 U.S.C. § 7701(g)(2). Because of the Civil Service Reform Act's (5 U.S.C. § 7701(g)(2)) incorporation of the attorneys' fees provision of the Civil Rights act of 1964 (42 U.S.C. § 2000e-5(k)) and the General Accounting Office Personnel Act's (31 U.S.C. § 753(d)) incorporation of the attorneys' fees provision of the Civil Service Reform Act (5

U.S.C. § 7701), attorneys' fees are recoverable from the General Accounting Office on the same basis as any other federal employer.

Section 7701(g)(2) of the Civil Service Reform Act is an exception to the general attorneys' fees provision of 5 U.S.C. 7701(g)(1). 5 U.S.C. § 7701(g)(2). As stated by the Court of Appeals for the Federal Circuit: "Section 7701(g)(2) carves out the first exception [to 5 U.S.C. § 7701(g)(1)], discrimination cases, where attorney fee payment must be in accordance with the Civil Rights Act of 1964." Williams v. Office Personnel Management, 718 F.2d 1553, 1555 (Fed. Cir. 1983).

This requirement, that 42 U.S.C. § 2000e-5(k) be applied to award attorneys' fees, "is intended not to impose a requirement that an express finding of fact [of discrimination] be made, but to distinguish cases involving discrimination from other types of cases, referred to in § 7701(g)(1), in which a government agency might also be required to pay attorneys fees. Such a distinction is not required in the provision pertaining to the private sector since all actions for attorneys fees [in such cases] under 42 U.S.C. § 2000e-5(k) arise from discrimination cases." Wood v. Regan, 622 F.Supp. 399, 402

(E.D. Pa. 1985) (emphasis in original). In Wood, the court noted that "[w]ithout clearer direction from Congress, it would seem improper to make ... a distinction between [civil rights] actions against private and public employees, given that 'in general ... the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government.' Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). See also Chandler v. Roudebush, 425 U.S. 840, 841, 96 S.Ct. 1949, 1950, 48 L.Ed.2d 416 (1976)..." 622 F.Supp. at 402.

Where a violation of Title VII is involved, attorneys' fees may be awarded even absent an explicit finding of discrimination. Id. See also, Maher v. Gagne, 448 U.S. 122 (1980). Although the Personnel Appeals Board did not explicitly state that Title VII had been violated, its finding, as noted above, is that conduct proscribed by Title VII occurred. Accordingly, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), as incorporated by the Civil Service Reform Act, 5 U.S.C. § 7701(g)(2), which is in turn incorporated by the General Accounting Office Personnel Act, 31

U.S.C. § 753(d), petitioner is entitled to an award of attorneys' fees for defending against the General Accounting Office's appeal to the Court of Appeals.

Pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), and the Civil Service Reform Act, 5 U.S.C. § 7701(g)(2), petitioner is entitled to an award of attorneys' fees and costs from the court. See Wood v. Regan, 622 F.Supp. at 401, 403. The Court of Appeals decision to the contrary places every federal employee, who prevails before the Merit Systems Broad or the GAO Personnel Appeals Board on a finding of discrimination

in the position of defending a Title VII victory without benefit of the Title VII attorneys' fee award remedy. Such a result is entirely inconsistent with Title VII, the Civil Service Reform Act of 1978 and the General Accounting Office Personnel Act of 1979.

2. Furthermore, the Court of Appeals for the Federal Circuit[4/] has held that attorneys' fees are available to prevailing parties for services rendered in the Court of

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4/ Under the Federal Courts Improvement Act of 1982, 28 U.S.C. § 1295(a)(9), the Federal Circuit Court of Appeals possesses exclusive jurisdiction to review decisions of the Merit Systems Protection under Chapter 77 of the Civil Service Reform Act, 5 U.S.C. §§ 7701-7703, where claims of discrimination are not involved.

Appeals seeking review of MSPB decisions. Olsen v. Department of Commerce, 735 F.2d 558, 561, 563 (Fed. Cir. 1984) ("there is nothing in the Reform Act or the Equal Access to Justice Act to indicate that Congress intended to bar the courts from awarding attorneys' fees for judicial proceedings to review Board decisions. To the contrary, the broad language of the Equal Access to Justice Act covers those cases." "It [regulation cited by the government] does not limit our authority to award fees for [legal] services to a party who prevailed before us after losing before the Board ... the language of the Back

Pay Act 'is sufficiently broad to include attorneys' fees for services rendered in administrative or judicial appeals ...' [Hoska v. United States Department of the Army,] 694 F.2d [270] at 273 [(D.C. Cir. 1982)]"). The Federal Circuit Court of Appeals has interpreted 5 U.S.C. § 7701(g)(1) as conferring authority to award attorneys' fees upon the Merit Systems Protection Board. Nonetheless, as that court held in Olsen, 5 U.S.C. § 7701 does not deprive the court of authority to award attorneys' fees under another applicable statute, such as

the Back Pay Act, 5 U.S.C. § 5596(b), and the Equal Access to Justice Act, 28 U.S.C. § 2412.

In fact, the District of Columbia Circuit, in Hoska v. United States Department of the Army, 694 F.2d 270 (D.C. Cir. 1982), interpreted 5 U.S.C. § 7701(g) as not affecting its authority to award attorneys' fees under appropriate statutes other than the Civil Service Reform Act. In other words, until the Court of Appeals for the District of Columbia Circuit issued the opinion underlying this petition, it was in accord with the Federal Circuit Court of Appeals' interpretation of 5 U.S.C.

§ 7701(g). As a result of the opinion in this case, however, the District of Columbia Circuit now rejects that it possesses authority to award attorneys' fees for services in court independent of the Civil Service Reform Act. This places it in conflict with the Court of Appeals for the Federal Circuit.

Even absent authority in 5 U.S.C. § 7701 to award attorneys' fees, the Federal Circuit Court of Appeals has determined that that section does not bar such authority under other applicable statutes in cases raised pursuant to Chapter 77 of Title 5 of the U.S. Code. Similarly, where claims of

discrimination are involved, 5 U.S.C. § 7701(g)(2) provides authority for judicial awards of attorneys' fees by its incorporation of Title VII's attorneys' fee provision. Title VII, in cases of employment discrimination is the statutory authority, independent of the Civil Service Reform Act, for judicial awards of attorneys' fees.

The Federal Circuit and District of Columbia Circuit Courts of Appeals are currently in conflict over the interpretation of 5 U.S.C. § 7701(g). Section 7701 of the Civil Service Reform Act is incorporated into the General Accounting Office Personnel Act, 31

U.S.C. § 753(d). A decision from this Court is necessary to resolve this conflict in the interpretation of 5 U.S.C. § 7701(g).

3. Congress has mandated the en bloc incorporation of Title VII, including the attorneys' fee provision, 42 U.S.C. § 2000e-5(k), by the GAO Personnel Act. 32 U.S.C. § 732(f)(2). The Court of Appeals' opinions are in direct conflict with Congress' mandate. The Court of Appeals misinterpreted the General Accounting Office Personnel Act, 31 U.S.C. § 732(f)(2), which preserves all Title VII rights and remedies of GAO employees.

The Court of Appeals held "[T]he General Accounting Office Personnel Act of 1979, 31 U.S.C. §§ 731-55, does not incorporate the attorney's fees provision of Title VII en bloc. Instead, the Act requires the GAO Personnel Appeals Board to prescribe regulations consistent with 5 U.S.C. §§ 7701-02, which, in turn, adopts Title VII's standard for the award of attorney's fees only when there has been a finding of discrimination prohibited under 5 U.S.C. § 2301(b)(1). 31 U.S.C. § 753(d)." App. A.

Section 732(f)(2) of the General Accounting Office Personnel Act of 1979 reads: "This subchapter

and subchapter IV of this chapter do not affect a right or a remedy of an...employee...under a law prohibiting discrimination in employment in the Government on the basis of race, color, religion, age, sex, national origin..." 31 U.S.C. § 732(f)(2). The Personnel Appeals Board found that petitioner had been retaliated against for having filed charges of discrimination. As discussed above, freedom from reprisals for pursuing claims of discrimination is a right under "a law prohibiting discrimination in employment in the Government."

This right to be free from retaliation for pursuing claims of discrimination within the General Accounting Office is a right incorporated by the GAO Personnel Act of 1979 from laws "prohibiting discrimination in employment in the Government" by 31 U.S.C. § 732(f)(2).

Section 732(f)(2) of the GAO Personnel Act incorporates not only the rights contained in "laws prohibiting discrimination," but also the remedies. Title VII provides for awards of attorneys' fees and costs to prevailing parties for services rendered in administrative and judicial fora.

42 U.S.C. § 2000e-5(k). It authorizes courts to make such awards. Awards of attorneys' fees and costs are one of the remedies provided in Title VII for violation of Title VII rights. As the Personnel Appeals board found that petitioner's rights were violated, which rights are secured by Title VII, petitioner is entitled to his Title VII remedies, including attorneys' fees and costs, undiminished by any other provision of the GAO Personnel Act.

The Court of Appeals' opinion failed to carefully consider that Section 732(f) preserves Title VII rights and remedies in their

entirety. Title VII rights and remedies, are incorporated, en bloc, into the GAO Personnel Act by virtue of Section 732(f).

In fact, Section 732(f)(2)'s current language reflects the 1982 revision of the GAO Personnel Act. Pub. L. 97-258, 96 Stat. 877 (1982).5/ Originally, the section expressly incorporated Section 717 of the Civil Rights Act of 1964, as amended. 31 U.S.C. § 52-

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5/ Public Law 97-258 was an Act to revise, codify and enact portions of the U.S. Code concerning money and finance, without substantive changes. See generally H. Rep. No. 97-651, Report of the Judiciary Committee of the House of Representatives on H.R. 6128, 97th Cong., 2d Sess. (1982) reprinted in 1982 U.S. Code Cong. & Ad. News 1895.

2(g)(3)(1980), Pub. L. 96-191, 94 Stat. 27, 29 (1979) (the citation prior to the 1982 revision). Section 52-2(g)(3), in pertinent part read:

> Nothing in this Act shall be construed to abolish or diminish any right or remedy granted to employees ... in the General Accounting Office by section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), by sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 791, 794(a)), or by any other law prohibiting discrimination in Federal employment on the basis of race, color, religion, age, sex, national origin...

P.L. 96-191, 94 Stat. 27, 29 (1979).

Section 732(f)(2) is the revised section 52-2(g)(3). The 1982 revision created new section numbers and struck express reference to various civil rights statutes. This was not a substantive change and was done solely because Congress deemed such references unnecessary, surplusage in conjunction with the remaining language: "under a law prohibiting discrimination in employment in the Government on the basis of race, color, religion, age, sex, national origin..." H. Rep. No. 97-651 at 38, reprinted in 1982 U.S. Code Cong. & Ad. News at 1932. Congress originally incorporated Title VII and the various other

equal employment opportunity statutes, without limitation on any right or remedy, into the GAO Personnel Act. The incorporation was en bloc. In 1982, Congress saw no difference between express reference to the various civil rights statutes and the reference to the principal prohibited bases of those statutes. The current language, seen by Congress as equally encompassing as the previous language, also constitutes an en bloc incorporation of Title VII.6/

6/ While the GAO Personnel Act was being debated in Congress, Comptroller General Elmer Staats, on behalf of the GAO, unequivocally testified that the proposed legislation was necessary to ensure that Title VII of the Civil Rights

(footnote continued)

The Court of Appeals misinterpreted Section 732(f)(2)'s preservation of Title VII rights. The court's opinion denying rehearing casts the meaning of the GAO Personnel Act into a sea of confusion. First it denies that 31 U.S.C. § 753(d)'s incorporation of 5 U.S.C. § 7701(g)(2) provides authority for judicial awards of attorneys fees under 42 U.S.C. § 2000e-5(k). Then, the court denies that 31 U.S.C. § 732(f) incorporates Title VII rights and

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(footnote continued from previous page) Act of 1964 covered GAO employees. See Hearings on H.R. 3339 Before the Subcomm. on the Civil Service, House of Representatives Comm. on the Post Office and Civil Service, 96th Cong., 1st Sess. at 46 (1979).

remedies en bloc. The court follows this by stating that Title VII is in fact incorporated, piecemeal, into the GAO Personnel Act by virtue of 31 U.S.C. § 753(d). App. B. If, as the court has held, 31 U.S.C. § 753(d) does not entitle GAO employees to Title VII attorneys' fees when the GAO challenges their Title VII victories in the Court of Appeals then 31 U.S.C. § 753(d) does not, as the Court of Appeals also held, incorporate 42 U.S.C. § 2000e-5(k). Furthermore, the court has held that 31 U.S.C. § 732(f) does not incorporate Title VII en bloc. The court's confusing interpretations permit subchapter IV

of the GAO Personnel Act, 31 U.S.C. §§ 751-754 to supercede 31 U.S.C. § 732(f)(2), in direct conflict with the express language of that section and with the legislative history of the GAO Personnel Act. The interpretations of the Court of Appeals are, petitioner submits, incorrect and deprive GAO employees of substantial rights. This Court should resolve the confusion wrought by the Court of Appeals.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FITZPATRICK & VERSTEGEN

By: _____
ROBERT B. FITZPATRICK

By: _____
MARK D. LAPONSKY, ESQ.

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December, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1443 September Term, 1986

General Accounting Office,

Petitioner

v.

General Accounting Office Personnel Appeals Board.

Respondent

FILED: June 29, 1987

BEFORE: Wald, Chief Judge; Mikva and Williams, Circuit Judges

O R D E R

Upon consideration of the Motion for Leave to File Motion for Leave to Intervene submitted by Movant-Intervenor Ramey, Petitioner's Response thereto; and of Petitioner's Motion for Voluntary Dismissal, Movant-Intervenor's Opposition thereto, Petitioner's Response, and Movant-Intervenor's Reply thereto, it is

ORDERED by the court that the Motion for Leave to file Motion for Leave to Intervene be granted. The Clerk is directed to mark the docket sheet accordingly. It is

FURTHER ORDERED by the court that the Motion to Intervene be granted. It is

FURTHER ORDERED by the court that the Motion for Voluntary Dismissal be granted, with no costs to any party. Intervenor Ramey has not demonstrated an adequate basis for an award of fees or costs. Neither the statutory basis relied on by intervenor nor the court's authority pursuant to Rules 38 and 39 of the Federal Rules of Appellate Procedure justifies an award of costs or fees in this case. Contrary to intervenor's allegation, the General Accounting Office Personnel Act of 1979, 31 U.S.C.

§§ 731-55, does not incorporate the attorney's fee provisions of Title VII en bloc. Instead, the Act requires the GAO Personnel Appeals Board to prescribe regulations consistent with 5 U.S.C. §§ 7701-02, which, in turn, adopts Title VII's standard for the award of attorneys fees only where there has been a finding of discrimination prohibited under 5 U.S.C. § 2301(b)(1). 31 U.S.C. § 753(d). The record does not indicate such a finding in this case. Even had there been such a finding, it could form the basis of a claim only for fees incurred in proceedings before respondent Personnel Appeals Board, for § 7701

relates to fees incurred in proceedings before the agency board, not to judicial proceedings. See Olsen v. Dep't of Commerce, 735 F.2d 558, 560 (Fed. Cir. 1984). It is

FURTHER ORDERED by the court that all other pending motions be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely request for rehearing. See D.C. Cir. Rule 14.

Per Curiam

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1443 September Term, 1986

General Accounting Office,

Petitioner

v.

General Accounting Office Personnel Appeals Board.

Respondent

FILED: September 10, 1987

BEFORE: Wald, Chief Judge; Mikva and Williams, Circuit Judges

O R D E R

Upon consideration of intervenor's Petition for Rehearing and Suggestion for Rehearing En Banc, it is

ORDERED by the court that the petition be denied. As we held previously, the General Accounting Office Personnel Act of 1979, 31 U.S.C. §§ 731-755, does not incorporate en bloc the attorneys' provisions of Title VII. This court has fully considered 31 U.S.C. § 732(f)(2) and we do not read it to incorporate Title VII en bloc into the General Accounting Office Personnel Act. Section 732 (f)(2)

merely allows a GAO employee to bring an action under, inter alia, Title VII to redress the grievances listed therein. Such an action would not be precluded by the employee's GAO status or by anything else in the General Accounting Office Personnel Act.

Furthermore, there are other sections of the General Accounting Office Personnel Act which do not incorporate certain sections of Title VII. See 31 U.S.C. § 753(d)(1); 5 U.S.C. §§ 2302(b)(1)(A), 7701(g)(2). These piecemeal incorporations would have been unnecessary, and would be rendered superfluous, were Section

732(f)(2) a total incorporation of Title VII. Congress has demonstrated that it knows how to incorporate statutes by incorporating the selected sections described above. If Congress had intended to incorporate Title VII en bloc into the General Accounting Office Personnel Act, it would have drafted specific language in Section 732(f)(2) so stating.

The court wishes to clarify that the statutory reference to 5 U.S.C. § 2301(b)(1) on page two of its June 29, 1986 order should read: "5 U.S.C. § 2302(b)(1)."

Per Curiam

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1443 September Term, 1986

General Accounting Office,

Petitioner

v.

General Accounting Office Personnel Appeals Board.

Respondent

FILED: September 29, 1987

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, Circuit Judges

O R D E R

Intervenor's suggestion for rehearing en banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court, en banc, that intervenor's suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

BEFORE THE
PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

ALFRED E. RAMEY, Petitioner v. GENERAL ACCOUNTING OFFICE Respondent	Docket 40-209-17-83

DECISION OF THE PAB

In this matter, the Board considers the findings of fact and decision recommended in the report of the Hearing Officer appointed by the Board to hear this case.

BACKGROUND

This case involves an appeal by Petitioner Alfred E. Ramey of the denial of his within-grade salary increase in May and July of 1983 and his subsequent removal from employment by the General Accounting Office (GAO or Agency) for alleged performance-based reasons.

During the period in question, Petitioner was employed as a GS-13 Computer Specialist in the Accounting and Financial Management

Division (AFMD) of GAO. Wilbur Campbell was the Acting Director of AFMD. Petitioner was assigned to the Financial Systems Group within AFMD. The primary function of the Financial Systems Group was to review and approve accounting systems in the various agencies of the federal government. Virginia Robinson was the Associate Director in charge of the Financial Systems Group. She was Petitioner's second-level supervisor. His immediate supervisor was, until February 1982, Jack Kearns. When Petitioner filed a discrimination suit against Kearns, he was transferred to the direct supervision of Ms. Robinson. Ms. Robinson supervised Petitioner from February to September of 1982. Maurice Moortgat was Petitioner's supervisor from September 1982 until Petitioner's removal in January of 1984.

In early 1983 Petitioner's supervisors, Moortgat and Robinson, determined that Petitioner's performance had become unacceptable. During the same time period, Petitioner became eligible for a within-grade

salary increase (WIG). According to GAO Order 2531.3, dated December 11, 1980 Petitioner was to be given 60 days advance notice prior to the due date of his salary increase in order to improve his performance. The Agency failed, however, to provide Petitioner with the required 60 days advance notice. Therefore, effective May 18, 1983 he was afforded a 60-day period to improve, after which a new determination would be made. On July 20, 1983 upon completion of the 60-day notice period, Petitioner received a second unacceptable performance rating. In the second rating, Petitioner's work was rated as unacceptable in:

1. Job planning.
2. Data gathering and documentation.
3. Job analysis.

Petitioner was also rated borderline in written communications as well. However, Petitioner was rated as fully successful in:

1. Oral communications.
2. Administrative duties.
3. Maintaining effective working

relationships.

The May 18, 1983 memorandum from Campbell to Petitioner stated that Petitioner's within-grade increase (WIG) denial was based on an evaluation of Petitioner's work on three assignments: 1) the microfiche order, 2) the significant changes definition, and 3) the ADP model documentation project. The memorandum further stated that Petitioner had failed to complete the above assignments "...in a timely manner and with the degree of quality and independence expected of someone at your grade level, GS-13." The July 20, 1983 memorandum notifying Petitioner that his performance was still unacceptable was premised on a single assignment he was given in the interim 60-day period, an assignment referred to by the parties as the OCHAMPUS assignment.

Pursuant to GAO Order 2531.3, Petitioner requested reconsideration of the WIG denial by the Comptroller General. A grievance examiner was appointed (a GAO GS-13 evaluator named Donald Lentz, who worked in a different division from Petitioner). Lentz conducted an

examination, after which he issued a report in which he concluded that Petitioner's work products were either untimely or were not of the requisite quality compatible with Petitioner's grade. Lentz ruled that the denial of Petitioner's WIG should be upheld. The Comptroller General adopted the grievance examiner's report and upheld the WIG denial. Petitioner then appealed to the Board.

On August 5, 1983 Petitioner was notified that his overall performance had been rated as unacceptable and that he was to have a 90-day opportunity period in which to demonstrate improved performance. Petitioner was advised that a failure to improve his performance could lead to a reduction in grade or removal from the service. At the conclusion of the 90-day opportunity period, Ms. Robinson prepared a letter, dated November 18, 1983 proposing the Petitioner's removal. In that letter, Ms Robinson recited various deficiencies in Petitioner's performance during the 90-day period in the three critical job elements as to which he had previously

been rated as unacceptable. The letter stated that not only had Petitioner failed to improve in the three critical areas, but that his performance had also deteriorated in one other category.

By letter dated December 8, 1983 Petitioner was notified by Acting Division Director Wilbur Campbell that he would be removed from his position effective January 7, 1984. The letter was delivered to Petitioner on December 14, 1983. On January 25, 1984 the General Counsel of the PAB sought a stay of 20 days in order to investigate the matter. The motion was granted, and Petitioner's removal was stayed until February 18, 1984. On January 31, 1984 the Agency filed a motion to vacate the stay on jurisdictional grounds, and on February 16, 1984 the Board denied the motion. The Agency then agreed to retain Petitioner in employment status until March 30, 1984 in order to allow for motions to be heard by the U.S. District Court on Petitioner's action in that forum. On March 24, 1984 the General Counsel of the PAB filed a motion to

indefinitely stay Petitioner's removal ont he grounds that the events leading to Petitioner's removal constituted reprisal for Petitioner's exercise of his appeal rights. On April 16, 1984 the PAB issued an order staying the removal of Petitioner pending adjudication of the merits of Petitioner's case before the Board.

The administrative hearing in this matter began on September 26, 1984. During the course of the hearing the Agency made a motion for the vacation of the stay order. Arguments were heard on the motion to vacate. On March 6, 1985 the Hearing Officer issued an order vacating the indefinite stay. On March 8, 1985 Petitioner was removed from the GAO rolls. On April 9, 1985 the General Counsel filed an appeal of the Hearing Officer's order vacating the indefinite stay. The Board elected to grant interlocutory review and, on July 22, 1985 the Board affirmed the order vacating the stay, for the reasons stated in the order.

CONTENTIONS OF PETITIONER

Petitioner contends that the Agency's actions in first denying his within-grade salary increase and then removing him from employment with GAO as a GS-13 Computer Specialist were taken in retaliation for his having filed and pursued an EEO complaint against the Agency. Petitioner argues that the Agency failed to prove by a preponderance of the evidence that he was performing at an unacceptable level of competence when his WIG salary increase was denied. Petitioner further argues that the Agency's decision to remove him is not supported on the record by substantial evidence.

On the specific issue of the denial of Petitioner's within-grade salary increase, Petitioner contends that his performance on the assignments on which the salary increase denial was based warrants a finding that the decision to withhold Petitioner's salary increase must be reversed. Petitioner points to four assignments that provided the basis for the salary increase denial: the Microfiche Order, the Significant Changes

Definition, the ADP Model Documentation Project, and the 60-Day OCHAMPUS Project. Petitioner's performance on the first three assignments provided the basis for the initial decision to deny Petitioner's WIG salary increase. Once Petitioner's performance on these assignments was deemed unacceptable, he was given a 60-day notice period prior to a final determination being made regarding his salary increase. The assignment given to Petitioner during the 60-day notice period was the OCHAMPUS project.

Petitioner's argument regarding these four assignments is bifurcated. Petitioner contends that the manner in which he was assigned and evaluated on his performance on the Microfiche Order, the Significant Changes Definition and the ADP Model Documentation Project does not support the salary increase denial decision. Petitioner further contends that, even if these three assignments prior to the OCHAMPUS project warranted the initial salary increase denial, the Agency failed to meet its burden of proof with regard to the

OCHAMPUS assignment, and therefore, the decision to permanently withhold Petitioner's WIG increase must be reversed. Petitioner argues that the Agency did not sustain its burden of proof because the Agency neither produced sufficient evidence to show that Petitioner was given clear instructions regarding his assignments, nor that the products Petitioner produced were unacceptable. Thus, Petitioner reasons, the Agency's initial determination that his performance was unsatisfactory was not supported by the evidence on the record.

Petitioner also contends that the Agency failed to sustain its burden of proof regarding the 60-day OCHAMPUS assignment. Petitioner argues that the Agency failed to prove by a preponderance of the evidence that the OCHAMPUS assignment was a reasonable (doable) assignment and, by the same standard, that Petitioner's performance on the assignment was unacceptable. Petitioner maintains that the record evidence shows that the OCHAMPUS assignment was either illogical

and impossible to perform or unfair and unreasonable at the time it was assigned, and thus, Petitioner should not be penalized for failing to adequately respond to such an assignment.

With regard to the issue of Petitioner's removal, Petitioner contends that, if the Agency action denying Petitioner's WIG salary increase was not supported by the evidence, then the removal action must be reversed for want of a proper predicate. In the alternative, Petitioner also alleges that harmful error was committed when the Agency failed to consider Petitioner's response to the non-performance charges prior to issuing the removal letter.

Petitioner contends that a retaliatory motive prompted the Agency's actions against him, and that the Agency's claims that his performance was unacceptable were but a pretext for unlawful discrimination.

CONTENTIONS OF RESPONDENT

The Agency contends that it proved by a preponderance of the evidence that Petitioner

was not performing at an acceptable level of competence for a GS-13 Computer Specialist when his within-grade increase was denied. The Agency contends that it proved by substantial evidence that Petitioner's performance on one or more critical elements of his job description was unacceptable and that it based Petitioner's removal on that unacceptable performance. The Agency further contends that Petitioner failed to carry his burden of proof that the motivating factor in the denial of his salary increase and his subsequent removal from employment at GAO was reprisal for the exercise of his appeal rights. Specifically, the Agency argues that an analysis of Petitioner's performance during the relevant period shows that Petitioner failed to acceptably perform the major duties and responsibilities of a GS-13 Computer Specialist.

It is the Agency's contention that Petitioner was given four assignments during the period of July 1981 to November 1983 which required the preparation of written work

products. These assignments were the Microfiche Order, the ADP Model Documentation Project, the 60-Day OCHAMPUS Assignment and the 90-Day Procedures to Implement New Approval Process. The first three projects formed the basis of the Agency's denial of Petitioner's WIG salary increase, and the fourth assignment was given Petitioner as his 90-day opportunity project. The Agency argues that all of these assignments were well within the ability of a GS-13 Computer Specialist; that Petitioner consistently failed to complete any of the assignments in an acceptable manner; that Petitioner consistently failed to follow the instructions of his supervisors to improve his work products; that Petitioner's supervisors were required to spend more time reviewing his work than that of other employees; that Petitioner unilaterally decided that some of his assignments were not worth doing for various reasons, all irrelevant; and that Petitioner did not demonstrate the ability to think or act with the independence required of a GS-13

Computer Specialist.

THE HEARING OFFICER'S REPORT

On October 23,1985 after more than 20-days of hearing in this matter, the Hearing Officer entered her Report containing findings of fact and recommendations to the Board. After first concluding that the proper burden of proof imposed on the Agency was substantial evidence and to a preponderance of the evidence, the Hearing Officer found that substantial evidence in the record as a whole supported the Agency's May 18 and July 20, 1983 determinations to deny Petitioner a within-grade salary increase because his performance was not at an acceptable level of competence. The Hearing Officer also found that there was substantial evidence to support the Agency's evaluation of Petitioner's work as unacceptable during the 90-day opportunity period, and further, that the record as a whole provided substantial evidence that the Agency properly concluded that Petitioner's work performance was unacceptable in several critical job elements, and remained so after

he was given a reasonable opportunity to demonstrate acceptable performance. The Hearing Officer found no procedural errors in the Agency's actions to remove Petitioner. Finally, the Hearing Officer found that there was no evidence in the record by which she could infer that the Agency's actions against Petitioner were motivated by a desire to retaliate against Petitioner, and thus, she concluded, Petitioner had failed to prove by a preponderance of the evidence that GAO's actions in denying Petitioner a WIG salary increase and/or subsequently in removing him from the GAO rolls of employment were taken in reprisal for the exercise of Petitioner's appeal rights.

The Hearing officer in this matter presided over the lengthy hearings in this matter in her capacity as a Member of the Board. Her term of office lapsed several weeks prior to the date of issuance of her decision. Accordingly, as a threshold matter, this Board must face an issue of first impression -- the appropriate scope of review of a decision

issued by an individual who served as a Presiding Member of the Board throughout all active phases of a proceeding, but who issued her decision in other than her capacity as a Member of the Board.

Section 4(h) of the General Accounting Office Personnel Act of 1980 ("Act"), provides that: "The Board may consider, decide, and order corrective or disciplinary action (as appropriate) in cases arising [within the Board's jurisdiction]." The Board's regulations recognize that a Presiding Member of the Board acts on behalf of the entire Board and the decisions of a Presiding Member are final decisions of the Board absent a timely filed Motion for Reopening or Reconsideration of such decisions. Further, this Board has treated interim decisions made by Presiding Members as determinations of the Board, subject, in appropriate cases, to interlocutory Motions for Reconsideration before the Board en banc.

The Board's regulations also allow for the appointment of a Hearing Officer who is not a

Board Member and treats the decisions of those non-Board members differently. The basis for such differing treatment is to avoid any improper delegation of this Board's decisional authority under the Act. Decisions of Presiding Members of the Board are Board decisions; decisions of non-Board Member Hearing Officers, however, are denominated by the Board's Regulations as "Reports of Findings of Fact and Recommendations." 4 C.F.R. Section 28.25. Decisions of Presiding Members are subject to Reopening and Reconsideration only in certain circumstances. This is an appellate type of review parallel in some ways to the type of judicial review provided by the Courts of Appeal to Board decisions. Reports of Findings of Fact and Recommendations, however, are treated differently by the Board's regulations. These require that "based upon th[e] Report [of the Hearing Officer], a member or panel of members of the Board shall issue a decision" in the case. Thus, a Hearing Officer's Report is no more than a recommended decision to the Board.

After the Hearing Officer's term as a Board Member expired, she was, technically speaking, without authority to continue to act and issue a decision of any type in this matter. To remedy this situation, by letter dated October 11, 1985, the Chairman of the Board appointed the Presiding Member as a Hearing officer to hear this matter. It was in that capacity that, on October 23, 1985 she issued her Report of Findings of Fact and Recommendations ("Hearing Officer's Report").

The record in this case spanned more than 20 days of hearing and included well in excess of one hundred exhibits. In this case, the Board recognized its legal obligation to issue a decision, after review of the record, which affirmed or rejected the Hearing Officer's Report, and further recognized that given the history of this case, review of the Board Member or Panel's decision by the entire Board was a strong possibility. Accordingly, the Board determined that it would be most efficient to have the entire Board serve as the reviewing panel of Members and that, to

facilitate that review, each Party would be allowed to further brief its position to the Board. The Parties were notified of this procedure by letter dated October 29, 1985.

On November 6, 1985 Petitioner filed a bill of exceptions to the Hearing Officer's Report and Recommendations. Petitioner argued that the Board should, in its review of the Hearing Officer's Report, make its own credibility determinations. Petitioner also specifically set forth those items of evidence which the Board should review for credibility. Petitioner also contends that it was an error for the Hearing Officer to apply a substantial evidence standard to the Agency's burden of proof on the denial of Petitioner's WIG increase, and instead, the standard should be preponderance of the evidence.

The Agency, in its reply to Petitioner's bill of exceptions, argues that the Board should apply the same deference to the Hearing Officer's Report as it would to a decision by a Presiding Member of the Board, since the Hearing Officer was a member of the PAB

throughout the period of the hearing, up until 23 days before the submission of the Report. The Agency argues that the Hearing Officer made a number of credibility determinations, and that each is supported by substantial evidence on the record as a whole, and that the Hearing Officer did not misapply the burden of proof regarding the denial of the WIG increase.

OPINION

The parties have raised two procedural issues. One is the scope of review of the Hearing Officer's Report. Petitioner advocates that the Board review the Report as a Hearing Officer's Report, which, as noted above, is merely a recommended decision to the Board which, by our regulations, we are not bound to follow. The Agency urges us to review the Report as if it were a decision of a Presiding Member of the Board.

In reviewing a decision by a Presiding Member, the Board will uphold that decision unless there is clear error or unless we find that the decision is not supported by

substantial evidence based on a review of the record as a whole. We need not reach the issue of which standard shall apply, because we would reach the same result regardless of which standard applies. The Board is unpersuaded as to the accuracy of the Hearing Officer's findings, and we do not think those findings are supported by the record evidence viewed as a whole.

The second issue regards the burden of proof to be applied to the Agency's denial of Petitioner's WIG increase in 1983. Petitioner urges the Board to reverse the Agency's action if it cannot be supported by a preponderance of the evidence. The Agency urges that the Board follow our own precedent, as decided in Kienzle v. GAO, 1 PAB 28 (1981) wherein we adopted the ruling that such performance-based actions as Agency determinations regarding the denial of WIG increases must be supported by substantial evidence on the record as a whole. We recognize that there is a conflict in the various United States Courts of Appeals as to whether the preponderance standard (cf., White

v. Department of the Army, 720 F.2d 209 (D.C. Cir. 1983) or the substantial evidence standard (Meyer v. Department of Health and Human Services, 666 F.2d 540 (Ct. Cl. 1981)) applies in WIG increase denials. We agree with the Hearing Officer's determination that Kienzle enunciates the proper standard, as we have reaffirmed in our recent decision in Chen v. GAO, ____PAB___ (1986).

The Board has carefully reviewed the entire record in this matter, and concludes that there is strong and persuasive evidence of reprisal in the Agency actions of denying Petitioner his within-grade increase and the subsequent removal of Petitioner from his position with the Agency. Because the Hearing Officer's Report, in our view, ignores or inadequately analyzes the record evidence regarding the issue of retaliation, we decline to adopt her Recommended Decision.

The Hearing Officer found that substantial evidence in the record as a whole supported the Agency's May 18 and July 20, 1983 determinations to deny Petitioner his WIG

denial, based on his failure to perform at an acceptable level of competence. These determinations were based on the first instance on Petitioner's performance on three major tasks: the Microfiche Order project, the Significant Changes Definition project, and the Model ADP Documentation project.

The May 18, 1983 memorandum from Acting Division Director Campbell to Petitioner stated that the denial of Petitioner's WIG increase was based on his failure to complete any of the three assignments, and that Petitioner's work product was untimely and of an unacceptable quality for a GS-13.

With respect to the first assignment, the Microfiche Order project, however, there are significant contradictions in the Agency's case. Although the WIG denial notice from Campbell states that Petitioner did not complete the assignment, the evidence on the record is inconclusive of that point. Petitioner's supervisor during the project, Virginia Robinson, considered the project a "pioneering effort," fairly complex, and with

no predetermined solutions or guidelines to follow. The uncontroverted evidence on the record shows that Petitioner submitted at least 10 or 11 drafts of the project; the Agency, however, produced no more than four or five drafts, none of which were positively identified in terms of chronology of submission or type of submission. No final draft of Petitioner's work product was produced in order to substantiate the Agency's claim that the final draft was unacceptable. Nor did the record contain any satisfactory explanation for the Agency's failure in this regard. Without resolving any of these inconsistencies in documentary or testimonial evidence, the Hearing Officer nevertheless found that Robinson's evaluation of Petitioner's work on this assignment was supported by substantial evidence on the record as a whole.

With respect to the second assignment, the Significant Changes Definition project, the evidence is undisputed that, shortly after Petitioner was given the assignment, GAO changed its procedures such that the

assignment became obsolete. Notwithstanding the fact that the assignment was withdrawn from Petitioner, the Significant Changes Definition assignment was cited as part of the basis for the denial of the WIG increase. The Hearing Officer discussed the withdrawal of the assignment but failed to address the issue of intent raised by the Agency's reliance upon that withdrawn assignment to support its decision to deny the WIG.

There are also inconsistencies on the record in regard to the third assignment, the Model ADP Documentation project. In Campbell's memorandum transmitting the notice of WIG increase denial, he states that the assignment was never completed, and that the first draft was two weeks late and the second draft was four weeks late. However, Maurice Moortgat, who was Petitioner's supervisor during the relevant period of the ADP Model Documentation project, testified that the drafts probably were on time, and that he may have received a final product from Petitioner, but that after he (Moortgat) submitted the final draft to

typing, he did not remember what happened to it. Again, these inconsistencies are not resolved by the Hearing Officer.

On the basis of Petitioner's performance on these three assignments,the Agency denied Petitioner his WIG increase. In notifying Petitioner of this decision, Campbell informed Petitioner that he would get a 60-day improvement period during which, if he performed acceptably, he would be able to recover his WIG increase. The assignment given to Petitioner during this period was the 60-day OCHAMPUS assignment, which Petitioner received in a May 24, 1983 memorandum from Moortgat. The OCHAMPUS assignment was to be completed under a new Systems Approval Methodology outlined to the Financial Systems Group in a May 10, 1983 memo from Robinson to the staff. The purpose of the new approval method was to test financial accounting systems using a risk-oriented methodology. It is based on three essential performance phases. The first phase is to identify areas of potential problems, or risks, in the

system. This is the General Risk Assessment (GRA) process. By performing this task, one can then determine which steps, or transactions, in the accounting system are more susceptible to fraud, or other problems, and which areas are in need of the least controls. The steps in the process in need of least controls are then eliminated from further consideration. By analyzing the flow of the remaining transactions in the process, one can then determine which the remaining steps in the accounting process are susceptible to the most (and least) risk potential. This is the Transaction Flow Review (or Analysis) phase (TFR). When the transactions in the process that possess the greatest risk potential for fraud or mistake have been identified, test plans are then developed to determine if the safety features in the program actually work to prevent the financial loss associated with fraud or waste. The test plan could not be developed without first doing the GRA and TFR.

Petitioner submitted two products in

response to this assignment, one on June 13, 1983 and one on July 15. Shortly thereafter, he was again rated unacceptable by Moortgat. As a result, Petitioner received another memorandum from Campbell (July 20) informing him of his unacceptable rating and the second (and final) denial of his WIG increase. The Hearing Officer found that there was substantial evidence on the record to support the Agency's determination that Petitioner's performance on this assignment was unacceptable. However, in doing so, she fails to address portions of the record which, in the Board's opinion, demand further analysis.

It is absolutely clear on the record that Petitioner's two relevant supervisors during the OCHAMPUS assignment, Robinson and Moortgat, changed their testimony during the hearing. The Hearing Officer acknowledges this point, but fails to accord it any weight. Robinson and Moortgat both testified that the OCHAMPUS assignment required Petitioner to merely plan the GRA, plan the TFR and plan the model test (plan-plan-plan). However, all of

the witnesses who understood the system testified (and the Hearing Officer found) that the assignment, as written, could only mean do the GRA, do the TFR, and do the test plan (do-do-do-). Even Robinson and Moortgat had originally stated (when deposed)that the assignment was "do-do-do." While there was a divergence of opinion with the witnesses as to whether or not "do-do-do" was practicable in the 60-day timeframe allotted to the assignment, they were unanimous that "plan-plan-plan" was illogical and unreasonable. The Hearing Officer states she does not know why Moortgat and Robinson would deliberately change their testimony, but accords their self-contradiction little weight in the decision.

It was also acknowledged by the witnesses that the OCHAMPUS assignment, in order to be completed properly, required the assistance of an accountant with the computer specialist. Petitioner originally had an accountant, Ernie Porter, assigned to work with him. Porter was reassigned, and a new accountant, Booth, was

assigned to work with Petitioner. However, Moortgat never told Petitioner that a new accountant had been assigned to work with him. Petitioner testified that he worked on the assignment thinking no accountant was available to him.

The Hearing Officer gives much deference to the testimony of Richard Jason, an expert witness for Petitioner (but called by the Agency during their case-in-chief, over the objections of Petitioner's counsel). Jason testified that the OCHAMPUS assignment was a "do-do-do", and that it was a reasonable assignment for a GS-13 computer specialist. Jason further testified that Petitioner's work products for the OCHAMPUS assignment were inadequate. However, on cross-examination, Jason testified that the entire concept of "plan-plan-plan" was illogical; that the assignment could take more than 60 days; that the test plan methodology was new to the government and new to GAO; and that there were no procedures in place to implement the methodology. While stating that Petitioner's

work product was unacceptable if the assignment was "do-do-do", Jason testified that anyone thinking that the assignment was "plan-plan-plan" did not understand risk-oriented methodology. Finally, Jason testified that if there was any confusion between "do-do-do" and "plan-plan-plan", the assignment was impossible, and that if Moortgat said the assignment was "plan-plan-plan", then everything in the record wa sin conflict with that statement and was confusing.

There are other inconsistencies on the record that are not, in our view, adequately addressed. Robinson's personal secretary, Gloria Gatewood, testified that Moortgat had given her a memorandum to type on July 14, 1983. The content of the memorandum was to grant Petitioner's WIG increase, and Gatewood stated that she type the memorandum and then placed it on Robinson's desk for her approval. Moortgat and Robinson professed to have no knowledge about the documents typed by Gatewood that purported to grant Petitioner's

WIG increase. Petitioner produced copies of the memorandum. While not denying that he may have authored such a document, Moortgat testified that he could not remember the document. The Hearing Officer credits Gatewood's testimony as to authorship of the memorandum on a basis which lacks record support and which rationale was specifically denied by Moortgat.

Viewing the record as a whole, the Board finds there is a real question as to whether there is substantial evidence to support the Agency's claims that the Petitioner's performance both prior to the WIG denial and also during the opportunity period was unacceptable. Even assuming, arguendo, that there is substantial evidence on the record to support the Agency's claims, the evidence regarding retaliation is sufficient to raise this matter to the level of a mixed motive case. And in a mixed motive case, when an employee has proven that his participation in protected activity was a motivating factor in the employer's decision to discharge him, even

the existence of a legitimate reason for the discharge will not necessarily prevent the discharge from being illegal. Allen v. N.L.R.B, 105 LRRM 1169 (1980), enforced, 108 LRRM 2513. Moreover, once the employee has made a showing that his protected activity played a role in the decision to terminate him, the burden shifts to the employer to show by a preponderance of the evidence that the termination would have occurred even absent the employee's protected conduct. Transport Management Corp. v. N.L.R.B., 462 U.S. 393, 113 LRRM 2587 (1983). See also, Day v. Weinberger, 530 F.2d 1083 (D.C. Cir. 1976).

The remaining issue is whether the denial of Petitioner's within-grade salary increase and Petitioner's subsequent termination were in retaliation for having filed EEO grievances against GAO and GAO officials.

It is well established (and the Agency does not dispute) that if it is demonstrated that the Agency took personnel actions against the Petitioner in reprisal for his exercise of statutorily protected appeals rights, then the

underlying personnel actions constitute prohibited personnel practices which must be overturned. In the instant case, the record contains both direct evidence of such unlawful intent by Agency supervision and also much evidence of such unlawful intent by Agency supervision and also much evidence which is difficult to explain and which, in our opinion, borders upon compelling that an inference of improper motivation be drawn. The remainder of the Board's Decision will analyze the record evidence regarding unlawful reprisal.

As discussed previously, the basis for the denial of Petitioner's WIG and his termination was his alleged failure to acceptably perform his duties as a computer specialist over a period of approximately 18 months. Specifically, Petitioner is alleged to have failed to complete several projects in a timely and acceptable manner: 1) the Microfiche Order; 2) the Significant Changes Definition; 3) the ADP Model Documentation Project; and 4) the OCHAMPUS Project.

The Agency's case was principally presented in the form of testimony by two witnesses, Robinson and Moortgat, and the documentary exhibits introduced through their testimony. Robinson and Moortgat testified to the effect that the assignments Petitioner received, both before and during his trial periods, were relatively simple and always reasonable and within the normal scope of duties for a GS-13 Computer Specialist.

The direct evidence of improper intent involves primarily the Petitioner's first and second level supervisors - Virginia Robinson, Associate Director of the Financial Systems Group, and Maurice Moortgat, Group Director in the Accounting and Financial Management Division. Further, although there was no specific showing the Wilbur Campbell, the individual who acted as the Deciding Official for Petitioner's denial of WIG increase and for Petitioner's removal, harbored such animus, the evidence is clear that Mr. Campbell made no independent review of Petitioner's work and relied solely upon the

conclusions of Ms. Robinson as to the adequacy of Petitioner's work product. Accordingly, any animus possessed by Ms. Robinson and which infected her recommendations must be viewed as fatal to the Agency's decisions which are under review herein.

Dealing first with the direct evidence of animus and intention to retaliate against Petitioner, we note that following the Petitioner's filing suit in the United States District Court seeking a trial de novo of his claims of discrimination in connection with a 1981 denial of a WIG increase,the Petitioner's work assignments were changed in ways which strongly suggest retaliation by the Agency.

For instance, James Dayton and Gerald DeRyder were co-workers of long standing with Petitioner. Each testified that Petitioner was treated differently from other AFMD computer specialists after he filed his EEO complaints; that the types of assignments given to Petitioner were out of the ordinary; and that Petitioner was the only person in the Accounting and Financial Management Division

who was not assigned to perform work on the review of systems design. Dayton and DeRyder also testified that Petitioner's work cubicle was moved out into the hallway after Petitioner filed his EEO grievance. Similarly, Ronald Eckman, an accountant who had worked with Petitioner in the AFMD for almost ten years, testified that Petitioner was treated differently when his work cubicle was moved to the corridor; that he observed Petitioner under constant and abnormal scrutiny after his cubicle was moved to the corridor; and that Petitioner's conversations were being monitored. Eckman further testified that it was the primary job of the accountants,not the ADP specialists in the AFMD, to perform the General Risk Assessment and Transaction Flow Review in developing an ADP test plan. Dayton, DeRyder and Eckman all testified that Petitioner was competent as a computer specialist. Eckman further testified that he had witnessed Jack Kearns, who was Petitioner's supervisor before Moortgat, go into Petitioner's office and throw papers on

Petitioner's desk. This occurred shortly after Petitioner had filed his suit, in which Kearns was named as a defendant.

The direct evidence on the record not only constitutes prima facie proof of the Agency's concerns about Petitioner's pending EEO grievances, but it also confirms that prior actions were taken in reprisal for Petitioner's protected activity. Taken alone, some of the testimony and evidence on the record seem merely questionable. Reading the record as a whole, however, the sheer number of the inconsistencies is compelling.

For instance, on several occasions, Robinson and Moortgat gave contradictory testimony. We have already noted their reversals of their positions on the scope of Petitioner's 60-day OCHAMPUS assignment as one requiring Petitioner to do a General Risk Assessment, then do a Transaction Flow Review, then do an ADP Test Plan. Later, they insisted that the assignment was to plan the GRA, plan the TFR, and plan the Test Plan. Robinson also testified that some of Petitioner's

assignments, especially the Microfiche Order, were simple routine tasks. but in the performance appraisal she prepared on Petitioner in August 1982 she stated that Petitioner's work was a "pioneering effort" that was made up of "fairly complex" tasks. When cross-examined as to the discrepancies in these characterizations, however, she stated that the August performance appraisal was overly generous, and could not really substantiate why she had so drastically changed her assessment of Petitioner with the May 1983 performance appraisal that formed the basis for the initial denial of Petitioner's WIG increase and Petitioner's placement on the 60-day opportunity program. In preparing that performance appraisal, Moortgat stated that Petitioner had been two weeks late with one chapter of the Model ADP Documentation assignment, and four weeks late with another chapter of the assignment, and that neither chapter was satisfactorily completed. Again, however, in his testimony at the hearing, Moortgat could not testify with certainty that

Petitioner had actually been late with either of the Model ADP Documentation chapters, nor could the Agency furnish a copy of Petitioner's final work product to show the exact manner in which it was deficient. We find that these frequent contradictions seriously impact the credibility of Robinson and Moortgat.

In addition to these factors, and some of the other inconsistencies as noted herein, the Board is particularly struck by the following facts:

1. That at least one qualified expert testified that the new Systems Approval Methodology which Petitioner was required to implement under both his 60-day and 90-day opportunity period assignments was extremely difficult to perform because it was so new that no background information was available to be used as a standard and no criteria had been established for the accounting portion of the GRA;

2. In September 1983 Petitioner submitted a plan for completion of his 90-day

assignment which effectively proposed a new timetable for completion of the assignment, and, while both Moortgat and Robinson were aware that the timetable proposed by Petitioner would take him substantially past the expiration of his 90-day opportunity period, neither counseled him that these milestones were unacceptable;

3. The admission by Moortgat that 60 days was probably not enough time to complete the OCHAMPUS assignment;

4. The testimony by Lee Beaty, a computer specialist was a CPA, that it was the consensus of opinion of the computer specialists that the new Systems Approval Methodology could not be implemented by them because they had had no training or experience in it; yet this was the assignment Petitioner was given to do;

5. The opinion by Beaty and several of his Peers that Petitioner was competent as a computer specialist;

6. When Petitioner was given the 60-day OCHAMPUS assignment, the accountant he had

previously worked with was reassigned by Robinson. However, even though an accountant was generally considered to be indispensable to performing a GRA and TFR under the new Systems Approval Methodology, Moortgat never told Petitioner that a new accountant was available to work with him;

7. Robinson and Moortgat stressed the importance of the team approach for assignments within the AFMD, but every assignment Petitioner received after he filed his EEO complaint was an assignment that he was required to work on alone, even though an accountant-computer specialist team was said to be critical for work under the new methodology.

We have previously discussed the confusing nature of the assignments given to Petitioner. It is not clear from this record that Petitioner's work performance was objectively and impartially evaluated.

It is very clear that, prior to Petitioner's filing of his EEO grievances, he had performed acceptably for over ten years. Although it

can be argued that Petitioner's work left something to be desired (a finding that we need not make), Petitioner's performance does not rebut the strong record evidence of the Agency's intent to retaliate.

Under these circumstances, we do not think Petitioner was afforded a fair opportunity to demonstrate acceptable performance, given the assignments selected for Petitioner during the period following his filing of the EEO grievances, and given the circumstances attendant to his efforts to comply with his supervisors' directives.

In her review of Petitioner's arguments, the Hearing Officer states that there is no evidence that the Agency's actions were motivated by a desire to retaliate against Petitioner for the exercise of his appeal rights. On the contrary, based on he record when viewed as a whole, the Board finds that the adverse actions taken by the Agency against Petitioner were in reprisal for his protected EEO activities. The Board further finds that without the denial of Petitioner's

WIG salary increase, there would be no cause for th removal of Petitioner, and we hereby order that Petitioner be reinstated effective immediately, with back pay as provided for the by the Back Pay Act.

In view of these findings and conclusions, we need not discuss further the other issue raised by the parties.

/s/
Ira F. Jaffe, Chairman

/s/
James M. Brown

/s/
Charles Feigenbaum

/s/
Jessie James, Jr.

/s/
Jonathan E. Kaufmann

Dated: July 10, 1986

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of December, 1987, pursuant to Rules 19.3, 28.3 and 28.4(a) of the United States Supreme Court Rules, I caused three copies of the foregoing Appearance Form and Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to be deposited in the U.S. mail and mailed first class, postage prepaid to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530, to Carl Moore, Esq.,

General Counsel, General Accounting Office Personnel Appeals Board, 441 "G" Street, N.W., Washington, D.C. 20548, and to James F. Hinchman, Esq., General Counsel, U.S. General Accounting Office, 441 G Street, N.W., Room 7083, Washington, D.C. 20548.

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Counsel of Record for the
Petitioner